Supreme Court, U.S.
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No. 96-712

In The

Supreme Court of the United States

October Term, 1996

JOHN KAYE, Individually and in his capacity as Monmouth County Prosecutor; THE COUNTY PROSECUTOR'S OFFICE OF THE COUNTY OF MONMOUTH; JOHN DOES 1-100; JANE DOES 1-100

THE COUNTY OF MONMOUTH,
Intervenor in District Court,

Petitioners,

v.

BARBARA COLEMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

As discussed below, the questions presented in the instant petition by both the County of Monmouth and defendant John Kaye are based upon a fundamental disregard and mischaracterization of the holding of the Court of Appeals and prevailing legal principles in an attempt to catch the Court's attention. Ignoring the fact that the decision of the Court of Appeals rests upon a fact specific determination that the County of Monmouth waived any objection to jurisdiction in the case at bar by entering an appearance and actually participating in this matter, the County attempts to create the appearance of some constitutional question resulting from the imposition of liability upon the County when, in fact, there is none. In addition to the particularly fact sensitive nature of the court's determination in the case at bar, the Third Circuit's decision imposing liability on the County under New Jersey state law was based upon, and is consistent with, a proper application of and adherence to the applicable legal principles.

As to the remaining questions presented relating to the Third Circuit's decision affirming the jury's award of damages against Kaye under 42 *U.S.C.* § 1983, the petitioners similarly mischaracterize the basis for the jury's verdict, as well as the law, conveying the misimpression that the decision of the Court of Appeals allegedly presents a great question of public significance and is allegedly in conflict with other federal precedent.

The counter-statement of questions presented is as follows:

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW – Continued

1. Whether this Court should decline to exercise jurisdiction where the Third Circuit found that the County of Monmouth was liable in the case at bar for the acts of Prosecutor John Kaye under state law, where that finding was based upon a fact specific determination that the County entered an appearance and actually participated and defended its interests as a party from the inception of plaintiff's complaint through trial without objection and actually agreed to submit the issue of its own liability to the jury.

2. Whether this Court should decline to exercise jurisdiction as to the Third Circuit's decision finding that the County of Monmouth was liable for the acts of County Prosecutor John Kaye when the Third Circuit applied New Jersey law to find that the New Jersey Supreme Court would impose liability on the County for the discriminatory employment practices of County Prosecutor John Kaye.

3. Whether this Court should decline to exercise jurisdiction where the Third Circuit found that the jury award of compensatory damages to plaintiff against John Kaye under 42 *U.S.C.* § 1983 was properly based upon the evidence at trial and where the decision is consistent with the law as stated by this Court's precedent and has been uniformly understood and applied by the other courts that have addressed the issue.

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COUNTER-STATEMENT OF THE CASE

The plaintiff Barbara Coleman was employed as an investigator with the Monmouth County Prosecutor's Office ("MCPO"). After being passed over for promotion on three (3) consecutive occasions by equally or less-qualified males, and as a result of the failure of the Monmouth County Prosecutor John Kaye to respond to repeated written requests for an opportunity to discuss the situation, Ms. Coleman was forced to file a complaint of gender discrimination with the United States Equal Employment Opportunity Commission. After obtaining a right to sue on March 12, 1991, plaintiff filed a complaint in United States District Court for the District of New Jersey against John Kaye, individually and in his capacity as Monmouth County Prosecutor, the County Prosecutor's Office of the County of Monmouth, John Does 1-100 and Jane Does 1-100, alleging, *inter alia*, that they discriminated against her based upon her gender by failing to promote her to various positions in 1989 and 1990. The Summons and Complaint was served upon John Kaye, individually and in his capacity as Monmouth County Prosecutor. (A-4) Prosecutor Kaye also accepted service of the complaint on behalf of the MCPO. (A-4)

Contrary to the impression which the County seeks to convey, the County, at all times, recognized that it had an interest in the outcome of this lawsuit and was able to protect its pecuniary interests. As early as the institution of plaintiff's complaint with the EEOC, the County recognized its liability, as plaintiff's employer, for the acts of John Kaye and his subordinates and stepped in to respond to the allegations. In response to the questionnaire forwarded by the EEOC to the MCPO in response to plaintiff's complaint, Assistant County Counsel for the

County of Monmouth, Robert Hrebek, wrote to the EEOC and advised that he had "been assigned to handle the above inquiry" by Malcolm V. Carton, Esq., ***Monmouth County Counsel***. (A-10) Mr. Hrebek directed that all future correspondence be directed to his attention "as ***Assistant County Counsel***." (A-11) The County was kept informed of the charges. In fact, a copy of that letter was sent to Frederica Brown, Monmouth County Personnel Officer.

Even after the filing of plaintiff's complaint in district court, the County continued to participate in court proceedings and filed papers on behalf of the County. In a memorandum to the district court dated January 3, 1991, Special County Counsel, Richard T. O'Connor noted that "[t]he ***County of Monmouth*** shall rely upon the legal arguments and contentions contained in its supporting brief."

In April 1991, ***Assistant County Counsel*** Hrebek applied to the district court for an Order specifically granting the defendant Monmouth County Prosecutor's Office a thirty (30) day extension to file an Answer or responsive pleading. The letter listed Mr. Hrebek as "Attorney for Defendants." (A-12)

In May 1991, Gerald Dorf, Esq. entered an appearance on behalf of John Kaye "as an individual." Dorf was retained by Kaye with Monmouth County funds. (A-12) On that same day, Assistant County Counsel Hrebek, received an additional fifteen (15) day extension to file an Answer on behalf of defendant MCPO and defendant John Kaye, as Monmouth County Prosecutor. (A-12) The defense of lack of personal jurisdiction with respect to the

County was not interposed in any of the responsive pleadings. (A-11)

Special County Counsel O'Connor, wrote to plaintiff's counsel in March 1992 expressly recognizing the County's participation in the instant matter by stating as follows: "As you know, ***I represent Monmouth County in the above captioned matter.***" (A-12)

In or about August 1992, Mr. Dorf filed an Answer on behalf of defendant John Kaye, as an individual. The following day, Special County Counsel O'Connor for the County of Monmouth, filed an Answer on behalf of the County Prosecutor's Office for the County of Monmouth. Mr. O'Connor was specifically authorized by Malcolm Carton, Esq., ***Monmouth County Counsel,*** to file an Answer on behalf of John Kaye and the County Prosecutor's Office of the County of Monmouth.

In December 1992, Assistant County Counsel O'Connor stated that the "***County*** would be willing to pay some money – essentially an amount to cover reasonable legal fees and expenses to date and is agreeable that there will be no discrimination against your client."

On August 12, 1993, a joint representation agreement was signed by "Richard T. O'Connor, Special County Counsel for Malcolm V. Carton, Monmouth County Counsel" and by Gerald Dorf, Esq. and was filed with the court on behalf of all defendants. (A-11) On that same day, Special County Counsel, Mr. O'Connor requested the clerk to "enter the appearance of the firms of Gerald L. Dorf, P.C. and Malcolm V. Carton, Monmouth County Counsel, by Richard T. O'Connor, Special County Counsel, on behalf of Defendant John Kaye individually and in his Capacity as Monmouth County Prosecutor and the

County Prosecutor's Office of the County of Monmouth in the above captioned matter." (A-11)

During the three years and seven months of litigation, from 1991 to 1994, the County participated in all phases of pre-trial discovery, motions, court appearances and continued to represent and defend the ***County's*** interests. Moreover, the County was obviously aware of its interest in this lawsuit as is evidenced by its retention of counsel to represent both John Kaye and the Prosecutor's Office and payment of all legal fees for the defense of both Prosecutor Kaye and the MCPO.

Following a seven-day trial before Judge Brown in September 1994, counsel for both plaintiff ***and*** defendants, together with the court, drafted the jury charges and interrogatories, expressly recognizing that the County ***is*** vicariously liable for the acts of John Kaye and/or his subordinates under principles of *respondeat superior*. Recognizing the liability of the County of Monmouth as plaintiff's employer for the acts of John Kaye and agents of the MCPO, the charges accurately stated as follows:

> The County is an "employer" under this statute [N.J.S.A. 10:5-1, *et seq.*] Under state law, the County is legally responsible for any gender discrimination committed by its employees in the performance of their duties. This is known as the doctrine of respondeat superior. Thus, the County as an employer is legally responsible for any acts of intentional discrimination committed by its employees which proximately caused the failure to promote Investigator Coleman in May 1989, June 1990, and/or October 1990 because she was a woman, whether such discrimination

> was by Kaye or by one of his subordinates who made recommendations to Kaye.
>
> . . .
>
> The County, under the doctrine of respondeat superior, is liable for any intentional discrimination by its employees which resulted in plaintiff's non-promotion and for any pain, suffering, humiliation and mental anguish which this discrimination proximately caused her.

Based upon the evidence presented at trial, the jury deliberated and found that (1) Prosecutor John Kaye intentionally discriminated against plaintiff based upon her gender by not promoting her to Sergeant in June 1990 and October 1990; and (2) Prosecutor John Kaye and/or one or more of his subordinates who made recommendations to him intentionally discriminated against plaintiff in May 1989, June 1990 and October 1990. (A-4) The jury awarded plaintiff $15,000 against the County for compensatory damages and $10,000 in compensatory damages against Kaye. Based upon the compelling evidence of the egregious and reprehensible nature of the defendants' actions, including the many lies and efforts to hide the discrimination, as well as the willful disregard of plaintiff's pleas to remediate the discrimination, the jury also awarded $50,000 in punitive damages against Kaye and $350,000 in punitive damages against the County of Monmouth.[1]

After almost four (4) years of litigation and two weeks of trial, and, as recognized by the Court of Appeals

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[1] The petitioners have never appealed or raised in the district court or Court of Appeals the amount of punitive damages as being excessive.

"seemingly as an afterthought," (A-13) the County filed a motion to "intervene" and vacate the judgment in the above matter. (A-5) Although the County indisputably knew about the litigation since its inception and despite the fact that ***County Counsel*** actually served as co-counsel for John Kaye and the Prosecutor's Office in this very matter, the County sought to vacate the verdict on the basis that the County was not served with a copy of the Summons and Complaint. The defendants John Kaye and the MCPO filed a motion pursuant to Fed. R. Civ. P. 50(b) seeking judgment notwithstanding the verdict or, in the alternative, a new trial. (A-6-7)

Notwithstanding the fact that the County had consented to submit the issue of its own liability to the jury, by Order dated May 4, 1995, Judge Brown granted the County's motion and vacated the verdict and award of $15,000 in compensatory damages and $350,000 in punitive damages against the County finding that the verdict against the County could not stand because the County was not served with the summons and complaint. (A-7)

Alternatively, the court found that the County could not be held liable under a theory of *respondeat superior* for the acts of Prosecutor John Kaye under state law. (A-6) Plaintiff appealed the decision vacating the verdict and Kaye cross-appealed from the district court's decision affirming the jury verdict against him. The Court of Appeals reversed the decision of the district court vacating the jury's verdict as against the County and affirmed the jury's verdict against Kaye.

CORRECTIONS OF MISSTATEMENTS IN THE PETITION

Pursuant to United States Supreme Court Rule 15.1, respondents bring the following misstatements of fact contained within the petition to the Court's attention:

Petitioners' statement regarding the notice to and role played by the County not only omits virtually all of the evidence relied upon by the Court of Appeals in reaching their fact specific determination that the County waived any objection to jurisdiction, it is also grossly misleading. Furthermore, as stated previously, petitioners' statement that the County of Monmouth was not referred to in the body of the Complaint is simply not true. As recognized by the Court of Appeals, in addition to the fact that the County entered an appearance in this matter, it is undisputed that the complaint named the County Prosecutor's Office of the County of Monmouth.

Also misleading is the petitioners' assertion that the complaint was served on "Kaye only." While petitioners correctly note that the Court of Appeals acknowledged that service on Kaye does not constitute service on the County, the petitioners fail to apprise the Court that the complaint was served upon and accepted by Kaye in his individual capacity and also in his official capacity as County Prosecutor for the County of Monmouth, as well as the abundant evidence of both notice to the County and the actual participation of the County in the proceedings below.

The County's characterization of the district court's submission of a charge and interrogatory to the jury naming the County of Monmouth as being "inexplicable" ignores the evidence proffered to the Court of Appeals

that the counsel specifically retained by the County in this matter actually participated in drafting those charges and interrogatories and agreed to submit the issue of the County's liability to the jury.[2]

The County's assertion, as fact, that after learning of the jury's verdict the County moved in the trial court to intervene and vacate the verdict because "the County had not been a party" is factually wrong and disregards the specific finding of the Court of Appeals that the County was, indeed, a party. Petitioners' suggestion that the County did not have the opportunity to defend its interests and that it never participated in any of the trial proceedings is simply untrue.

Also misleading is the County's attempt to characterize the Third Circuit's finding that the County was a party as being based upon "largely certain correspondence from and documents filed on behalf of the Monmouth County Prosecutor's Office." The Court of Appeals found that the County itself had entered an appearance and had actually participated in all phases of the litigation process in defending its interests. The finding of the Court of Appeals that the County's interests were "indistinguishable from those of the MCPO," which petitioners assert was "legally incorrect," was properly based upon a fact specific consideration and evaluation of the participation by the County in the case at bar.

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[2] Perhaps the inability of the County's appeal counsel to understand or explain the charges and jury interrogatories is due to the fact that unlike respondent's appeal counsel, the County's appeal counsel did not participate in the proceedings below or at trial.

Also incorrect is the petitioners' characterization that the jury's award of compensatory damages was not supported by a "single shred of objective corroboration, either through her own testimony or otherwise. . . . "

Finally, the petitioners' assertion that there is some alleged conflict among the Court of Appeals with respect to the type of evidence necessary to support the recovery of damages under 42 *U.S.C.* § 1983 for emotional distress is factually untrue and is simply designed to create a basis for jurisdiction where there is none. As demonstrated herein, even the very cases cited by petitioners demonstrate that the circuits and district courts have universally understood and applied the same standards.

As discussed below, this petition fails to satisfy any of the standards that this Court has mandated will govern the court's exercise of discretion in favor of granting certiorari. This petition simply represents defendants' dissatisfaction with the decision of the Court of Appeals and nothing more.

POINT I

THIS COURT SHOULD DECLINE TO ENTERTAIN JURISDICTION AS TO PETITIONERS' CLAIMS RELATING TO THE COUNTY OF MONMOUTH.

1. This Court Should Decline Jurisdiction Because There Is An Independent Factual Basis For The Decision Of The Court Of Appeals.

By way of the instant motion, petitioners utilize the certiorari procedure to assert, for the first time, that the decision of the court of appeals, applying state law, raises alleged constitutional concerns relating to due process

resulting from the jury's verdict imposing damages against the County in the case at bar. None of these alleged constitutional issues were raised in the trial court, following trial or in post-trial motions, in the motion by the County of Monmouth to intervene and vacate the verdict, in any of the appeal papers filed in the four consolidated appeals or at oral argument.[3] More importantly, however, the decision of the Court of Appeals is based upon an independent fact specific determination and should not be disturbed.

It is well established that this Court has refused to decide constitutional questions when other grounds for the decision can be found in the record. *Neese v. Southern Railway Co.*, 350 *U.S.* 77 (1955). Where it appears that the judgment might have rested upon a non-federal ground, this Court has recognized it inappropriate to take jurisdiction. *Hedgebeth v. North Carolina*, 334 *U.S.* 806 (1948); *Woods v. Nierstheimer*, 328 *U.S.* 211 (1946); *White v. Ragen*, 324 *U.S.* 760 (1945); *McGoldrick v. Gulf Oil Corp.*, 309 *U.S.* 2 (1940); *Woolsey v. Best*, 299 *U.S.* 1 (1936); *Lynch v. NY Pierson*, 293 *U.S.* 52 (1934); *Cuyahoga Power Co. v. Northern Realty Co.*, 244 *U.S.* 300 (1917); *Adams v. Russell*, 229 *U.S.* 353 (1913).

In the case at bar, the decision of the Court of Appeals was based upon an independent fact specific determination that the County of Monmouth voluntarily entered an appearance and actively defended themself against plaintiff's claims from the inception of plaintiff's

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[3] Although those issues were never raised in any of the four (4) consolidated appeals, petitioners did belatedly attempt to raise these issues in their petition for rehearing and suggestion for rehearing *en banc* which was denied.

complaint through almost four (4) years of litigation and even expressly submitted the issue of its own liability to the jury for determination at trial. Ignoring or disregarding that finding, the County seeks to utilize this procedure to, once again, argue that it has no ability to control the personnel decisions of the County Prosecutor.

Notwithstanding the County's assertion that, as a general principle, imposing liability on a County for the acts of a County Prosecutor raises alleged constitutional questions (which it does not), an independent basis exists for the court's decision in the case at bar. Despite the County's attempt to reargue in this petition it did not have an opportunity to defend its interest in the proceedings below, the Court of Appeals found that it had.

The court specifically found that the County had "submitted itself to the jurisdiction of the district court, thereby waiving any claim that the district court lacked *in personam* jurisdiction." (A. 10) The Court of Appeals found that the County of Monmouth actively participated in both pre-complaint and post-complaint activities, including more than four (4) years of litigation. The County of Monmouth, through County Counsel, represented the interests of the County on the charge of discrimination initially filed by Ms. Coleman with the Equal Employment Opportunity Commission and also, recognized its liability for plaintiff's claims as stated in her complaint and had notice of, responded to and actively defended the County's interests through the litigation and trial. (A-10-13) The County of Monmouth specifically retained separate counsel to represent John Kaye in his individual capacity and ultimately entered into a joint representation agreement with Kaye's counsel, agreeing to let him represent the interests of the County at trial.

The County of Monmouth paid for all costs associated with the defense of the litigation and has also represented that it would be paying for the entire judgment including the judgment against Kaye.

The County's assertion that the County was not a party, filed no motions, did not participate in discovery and trial is both factually wrong and contrary to the express findings of the Court of Appeals. The Court of Appeals noted that at no time did representatives from the County Counsel's office ever object to jurisdiction as required by Rule 12(b)(1). Rather, the court found that to the contrary, attorneys from the County Counsel's office indicated that Monmouth County was actively aware of its possible exposure in this matter. (A-11)

Contrary to the County's assertion, the Court of Appeals' determination was not based "primarily" on "certain documents that pertained to the representation of the County Prosecutor's Office of the County of Monmouth." Also incorrect is the County's assertion that there was "no argument regarding the effect of these documents in either the district court or the Court of Appeals."

What the Court of Appeals did find is that correspondence from Special County Counsel contained ***admissions*** that the County was both a party ***and*** was represented in this matter. (A-12) In addition, the court found that Assistant County Counsel had represented himself as being attorney for defendants and had filed papers and motions in this action on behalf of Kaye and the MCPO. Assistant County Counsel did not object to lack of personal jurisdiction with respect to the County of Monmouth in any one of the responsive pleadings. (A-12)

Finally, the court recognized that the County, with County funds, had retained separate counsel to represent John Kaye as an individual. The court found that "[g]iven the County's pervasive involvement in the litigation of this matter and the County Counsel's Office's open acknowledgment that it was representing the County's interests, which by all appearances were indistinguishable from those of the MCPO . . . we conclude that Monmouth County's defense of lack of personal jurisdiction had effectively been waived long before the County, seemingly as an afterthought, filed its post-trial motion to vacate on jurisdictional grounds." (A-13) The court concluded that "the County of Monmouth was properly before the district court as a party." (A-13)

Because an independent factual basis exists for the finding of the Court of Appeals that the County is liable in the case at bar, this Court should decline to exercise jurisdiction.

2. The Petition Fails To Present Any Constitutional Or Federal Question As To The County's Liability.

Notwithstanding the fact that the Court of Appeals specifically found that the County was a party to the litigation and actively participated and defended its interests throughout the entire course of proceedings, the County argues that its due process rights were violated because it asserts it was not a party to the litigation until after the jury rendered its verdict. Based upon the County's disregard of the factual determination made by the Court of Appeals, the County asserts that the court's decision conflicts with this Court's precedent in *Richards v. Jefferson County, Ala.*, 135 *L.Ed.* 2d 76, 116 *S.Ct.* 1761

(1996). However, the court's decision imposing liability on the County does not violate the County's constitutional right to due process.

First, as noted above, the Court of Appeals found that the County voluntarily submitted to the jurisdiction, had notice and actively participated and defended its interests from the inception of plaintiff's complaint through trial. It is well established that even if an individual is not named as a party of record, he/she may be liable for the judgment if they participated in the suit or had an opportunity to be heard. *See Louisville & Nashville Railroad Co. v. Schmidt*, 177 *U.S.* 230 (1990); *Capo v. C-O Two Five Equipment Co.*, 93 *F.Supp.* 4 (*D.N.J.* 1950); *Miller v. Meadley*, 109 *N.J.* Eq. 436, 445 (Ch. 1932), 158 *A.* 118, *aff'd*, 112 N. J. Eq. 89 (E&A 1933), 163 *A.* 665 (1933). The New Jersey courts have recognized that the critical components of due process are adequate notice, opportunity for a fair hearing and availability of appropriate review. *Schneider v. City of East Orange*, 196 *N.J.* Super. 587, 595 (App. Div.), 483 *A.*2d 89 (1984) (*citing In re Suspension of Heller*, 374 *A.*2d 1191, 73 *N.J.* 292 (1977)), *aff'd*, 103 *N.J.* 115, 510 *A.*2d 1118, *cert. denied*, 479 *U.S.* 824 (1986)).

Moreover, even as a general principle, the imposition of liability on the County, despite the fact that they are unable to control the prosecutor's conduct, does not violate constitutional principles. First, even Mr. Carton, Monmouth County Counsel, "strongly disagrees with the part of the Brown Decision [the district court decision] vacating the verdict against the County that says 'State, not county officials, control the County Prosecutor.' " In an article that appeared in the New Jersey Law Journal on

May 15, 1995, Mr. Carton himself conceded that the Prosecutor "is not under the Attorney General as many people think." Mr. Carton further stated that "[i]n fact, prosecutors are paid by the County in which they work, and Kaye's defense was paid by Monmouth County." (Resp. App. 1-3)

Moreover, the finding of the Court of Appeals that the County is liable for the acts of County Prosecutor Kaye is not unprecedented and, in fact, is consistent with decisions by numerous other courts which have recognized that a political subdivision, such as a County, may be liable for the unlawful actions of an independent constitutional officer under principles of respondeat superior even if the County has no ability to control their conduct. *See Holda v. County of Kane*, 88 *Ill.App.* 3d 522, 410 *N.E.* 2d 522 (Ill.App.Ct. 1980) (finding the county was properly held vicariously liable for negligent acts of the sheriff, an independent constitutional officer, notwithstanding the fact that the county had no power to supervise, direct or control the actions of the sheriff.); *Drake v. City of Rochester*, 96 *Misc.* 2d 86, 94-97 (N.Y.Sup.Ct.), 408 *N.Y.S.* 2d 847, 853-856 (1978) (finding that the defendant County was vicariously liable for the unlawful acts of the county district attorney, a constitutional officer.)

In *Holda v. County of Kane*, the court found that the County was properly liable for the unlawful acts of the sheriff, an independent constitutional officer. *Holda*, 410 *N.E.* 2d at 559-560. The court rejected defendants' assertion that the County could not be liable because they had no power to supervise, direct or control the actions of the sheriff. In doing so, the court noted that the "control" test is merely one of a number of justifications offered for the

vicarious liability theory doctrine of *respondeat superior*. *Id.* at 560 (*citing* Prosser, Torts § 69 at 459 (4th Ed. 1971)). The court noted that while the degree to which the employee is subject to the control of the employer remains an important consideration in determining whether an employer will be held liable for the employee's actions on a vicarious liability theory, the absence of direct control does not, *ipso facto*, negate liability. The court found that this is particularly true with respect to a county officer, such as the sheriff, whose actions and duties involve a great deal of discretion but yet are performed entirely on behalf of the County. *Id.*

None of the cases cited by respondents compel a conclusion that the County's rights were violated. In *Richards v. Jefferson County*, petitioners filed a state court class action claiming the county's occupation tax violated the federal and Alabama constitutions. The State Supreme Court found that plaintiff's state claims were barred by a prior adjudication of the tax in an action that had been brought by Birmingham's Finance Division and the city itself consolidated with a suit by three county taxpayers. This Court held that because petitioners did not receive notice or sufficient representation in the prior litigation, that litigation could not bar them from pursuing their claims. *Richards*, 116 *S.Ct.* at 1761.

It is interesting that the County fails to point out this Court's reference in *Richards* to the decision in *Montana v. U.S.*, 440 *U.S.* 147 (1979). There, this Court held that even when non-parties assume control over litigation in which they have a direct financial or proprietary interest, they cannot be said to be "strangers to the cause" noting that "[one] who . . . defends a suit in the name of another to establish and protect his own right, or who assists in

the . . . defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he had been a party to the record." *Richards*, 440 *U.S.* at 154; (*quoting Souffront v. La Compagnie des Sucreries*, 217 *U.S.* 475, 486-487 (1910)); *See also Schnell v. Peter Eckrich & Sons, Inc.*, 365 *U.S.* 260, 262 n.4 (1961).

The County also relies upon the Court's decision in *Morrissey v. Brewer*, 408 *U.S.* 471 (1972), for the proposition that the County had the right to an opportunity to be heard in a meaningful manner and at a meaningful time. Not only did the Court of Appeals in the case at bar find that the County did have an opportunity to be heard, it found that it ***actually participated*** in the proceedings below. Moreover, aside from the general and broad propositions regarding due process, this Court's decision in *Morrissey* discussed the rights of criminal defendant parolee at a parole revocation hearing and is factually distinguishable and inappropriate in analyzing the rights of the County in the case at bar.

The County also relies upon this Court's decision in *Martin v. Wilks*, 490 *U.S.* 755 (1989) and *Hansberry v. Lee*, 311 *U.S.* 32 (1940). In *Martin*, a group of white firefighters challenged certain alleged discriminatory hiring practices in favor of black individuals. The defendants argued that the hiring decisions were made in favor of black individuals on the basis of race in reliance upon a consent decree entered years earlier and that the plaintiffs were barred by virtue of the consent decree from challenging those actions.

This Court found that the white firefighters were not precluded from challenging the employment decisions

taken pursuant to the consent decree to which the plaintiffs were not a party. This Court found that defendants were required to have joined plaintiffs as mandatory parties in the prior proceeding rather than requiring them to intervene. Because the plaintiffs had not been joined and, therefore, did not have adequate notice or knowledge of the earlier suit, ***unlike the County in the case at bar,*** the Court found that the petitioners were not barred from pursuing their claims.[4] *Martin,* 490 *U.S.* at 765.

In *Hansberry v. Lee,* respondents, certain landowners, brought suit to enjoin certain other landowners from selling their land to Negroes in violation of an agreement restricting the sale of such land to non-Negroes. The respondents argued that to enforce the agreement against them would deprive them of due process because they were not party to the earlier agreement and therefore, were not bound by its decree.

This Court found that the plaintiffs were not bound by the prior agreement because, ***unlike the County in the case at bar,*** they had not been represented in the earlier litigation. The Court found that the landowners in the first suit did not seek to bind or affect the interests of the plaintiff landowners. *Hansberry,* 311 *U.S.* at 44-45. In doing so, the Court again noted the principle that one is not bound by a judgment in personam in a litigation in which he is not a party.[5] *Id.* at 40.

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[4] This Court in *Martin* recognized that even one who is not a party may be bound by a judgment where their interests have been adequately represented by someone with the same interests who is a party. *Id.* at 762 n.2.

[5] This Court in *Hansberry* noted that in the context of class actions, it is a familiar doctrine of the federal courts that

Based upon the foregoing, the County's constitutional right of due process was not violated and the petition fails to raise a constitutional question.

POINT II

THIS COURT SHOULD NOT EXERCISE JURISDICTION WHERE THE DECISION OF THE COURT OF APPEALS RESTS UPON ITS PROPER APPLICATION OF STATE LAW

The County asserts that the Court of Appeals violated principles in *Erie* by failing to apply the agency test articulated by the New Jersey Supreme Court in *Lehmann v. Toys 'R Us*, 132 *N.J.* 587, 626 *A.*2d 445 (1993) in analyzing the County's liability in the case at bar. The County also asserts that the imposition of liability on the County for the acts of the County's Prosecutor is without any legal authority. However, as discussed below, the County's erroneous assertions simply overlook the court's proper analysis and application of state law in an attempt to predict how the New Jersey Supreme Court would rule if presented with the issue.

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members of a class not represented as parties to the litigation may be bound by a judgment where they are, in fact, adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties; or where the interest of the members of the class, some of whom are present, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. *Id.* at 42. The Court found that it is assumed that such procedure affords protection to the parties who are represented, although absent, which would satisfy the requirement of due process. *Id.* at 42-43.

In *Lehmann*, the New Jersey Supreme Court articulated a test for evaluating liability of employers in cases of sexual harassment under New Jersey law. *Lehmann's* finding of employer liability was based on a theory of *respondeat superior* and agency principles and was premised upon the theory that a master exercises a degree of control over their servant and should be responsible for the servant's conduct. To date, no other reported decision has extended the test in *Lehmann* to a case involving liability of a county for the acts of a county prosecutor.

Contrary to petitioners' assertions, the Court of Appeals did not ignore the decision of the New Jersey Supreme Court in *Lehmann*. Rather, the court found that the New Jersey Supreme Court would not rely upon the agency test articulated in *Lehmann* to analyze the liability of the county prosecutor. Recognizing that the issue of whether a county prosecutor acts as a county official when making personnel decisions at a county level is a question of first impression, the court found that based upon a review of related authorities, county prosecutors have a dual or hybrid status. Applying those authorities, the court predicted that the New Jersey Supreme Court, if presented with a case in this position, would hold that county prosecutors are acting on behalf of the county when they make personnel decisions.

Recognizing the persistent and strong commitment to eradicating discrimination in the workplace expressed by the New Jersey Legislature and the New Jersey Supreme Court, the Court predicted that the New Jersey Supreme Court would hold that Kaye was the Monmouth County policymaker in regard to personnel actions in the Prosecutor's Office and that the County of Monmouth may be

held liable for the acts of intentional discrimination that occurred.

Based upon a thorough review of the statutes and constitutional provisions pertaining to the duties and powers of the county prosecutor, the court found that the district court erred in concluding that county prosecutors in New Jersey are agents of the State Attorney General when they make personnel decisions. The court also found support in the pronouncement of the New Jersey Supreme Court in *Morss v. Forbes*, 24 *N.J.* 341, 132 *A.*2d 1 (1957) that the prosecutor is primarily a local official and the court's discussion of the county prosecutor's authority.

The court also responded to the invitation in the decision in *Cashen v. Spann*, 66 *N.J.* 541, 334 *A.*2d 8, *cert. denied*, 423 *U.S.* 829 (1975) wherein the New Jersey Supreme Court found that a county prosecutor was acting as an agent of the state for his alleged tortious conduct arising after an investigation of criminal activity but expressly left open "for another day the question of whether a county may be held vicariously liable for the conduct of a prosecutor or his detectives in other circumstances." *Id.* at 14.

The Court of Appeals found that based upon their review of New Jersey law, they were convinced that when a county prosecutor engages in classical law enforcement functions, they act as officers of the state. However, where the county prosecutor decides when an employee at his office is worthy of a promotion, the county prosecutor is performing an administrative function on the local level entirely unrelated to the duties involved in criminal

prosecution and concluded that Prosecutor Kaye was acting as a local, county official when he denied Coleman's application for promotion. The court concluded that since Kaye was the final policymaking authority on behalf of the County of Monmouth in the Prosecutor's Office, the discriminatory acts of Kaye and his subordinates may be imputed to the county.

Although not of precedential value, the decision of the Court of Appeals is consistent with two (2) unreported decisions in New Jersey. *See Giuffre v. Bissell*, Civil Action No. 92-2014 (*D.N.J.* May 7, 1995) (holding that the county is liable under the theory of respondeat superior of the unlawful acts of the county prosecutor); (Resp. App. 4). *Knodel v. the Office of the Union County Prosecutor*, Civil Action No. 89-2490 (*D.N.J.* Jan. 5, 1990) (finding that the county was liable for the unlawful employment practices against an employee of the Union County Prosecutor's Office) (Resp. App. 20). This Court also previously denied certiorari in *Crane v. State of Texas*, 759 *F.*2d 412 (5th Cir. 1985), *amended in part on denial of rehearing*, 766 *F.*2d 193 (5th Cir.), *cert. denied*, 474 *U.S.* 1020 (1985) wherein the Fifth Circuit held that, for purposes of a civil rights action, a county could be liable for the acts of a district attorney.

The County's reliance upon the decision in *BMW v. Gore*, 116 *S.Ct.* 1589 (1996) for the proposition that imposition of liability for punitive damages on the County violates "well established constitutional principles" is misplaced. First, the facts and issues that were presented in *BMW v. Gore* relating to whether the amount of a punitive damages award violated due process is entirely distinguishable from the issues presented in the case at

bar relating to whether punitive damages can be imposed upon the County. The factors relating to the reprehensibility of the defendants' conduct does not, as petitioners contend, even remotely suggest that imposition of punitive damages violates the County's due process rights. The reprehensible nature of the County's conduct in the case at bar is not at issue since there was no objection to submitting the issue of punitive damages to the jury and there is no dispute that the jury was properly charged on the legal basis for an award of punitive damages under New Jersey law.[6]

POINT III

THIS COURT SHOULD NOT EXERCISE JURISDICTION AS TO THE ISSUES RELATING TO KAYE WHERE THERE IS NO CONFUSION OR CONFLICT AMONG THE COURTS AS TO LIABILITY UNDER 42 *U.S.C.* § 1983

Perhaps recognizing that the issues relating to the County's liability are not properly before this Court and in an effort to create a basis for jurisdiction, the petitioners assert that the decision of the Court of Appeals affirming the jury's finding of liability against John Kaye in his individual capacity is purportedly in conflict with some other decision of the Court of Appeals. However, contrary to petitioners' assertions, the decision of the Court of Appeals affirming the award of compensatory

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[6] The defendants have never appealed or raised in the district court or Court of Appeals, the amount of punitive damages as being excessive. Respondents' attempt to take issue with the amount of the award, for the first time on appeal is untimely, not properly before this Court and is legally incorrect.

damages against Kaye under 42 *U.S.C.* § 1983 is not in conflict with ***any*** decision.

As noted previously, following a seven day trial, a unanimous jury found that Monmouth County Prosecutor John Kaye had intentionally discriminated against Ms. Coleman by failing to promote her on three separate occasions because of her gender. That jury awarded Ms. Coleman the modest sum of $10,000 in compensatory damages against Kaye.

Petitioners challenge the decision of the Court of Appeals upholding the jury's award of $10,000 in damages to Coleman against Kaye and assert that the decision of the Court of Appeals is contrary to the decision of this Court or any other court of appeals.[7] However, an examination of the law reveals that contrary to respondents' assertions, there is no uncertainty or confusion among the courts regarding the issue of pretext. Rather, the Court of Appeals properly applied the prevailing legal principles and agreed with the district court's evaluation on this strictly fact specific determination that the jury's verdict was supported by sufficient evidence presented at trial to support Ms. Coleman's emotional distress damages.

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[7] The County's assertion that the only evidence of Kaye's involvement to support the jury's finding of liability against Kaye under 42 *U.S.C.* § 1983 was that he delegated such decisions to his subordinates; that Coleman wrote him two memoranda about her non-promotion; and that he did not personally respond to those memoranda is simply untrue. However, since petitioners have not taken issue with Kaye's liability as opposed to whether the award of damages is supported by the evidence, no further response is necessary.

Petitioners rely upon the decision in *Carey v. Piphus*, 435 *U.S.* 247 (1978) in support of their claim that plaintiff's pain and suffering and emotional distress do not constitute an actual injury for which she is entitled to compensatory damages. In *Carey*, the Court found that a group of students who had suffered a deprivation of their constitutional rights were not entitled to compensatory damages because they failed to show that they had suffered any compensable injury. There was no proof, testimony or other evidence presented that plaintiffs had suffered any injury as a result of the defendant's conduct. Significantly, plaintiff did not assert damages for pain and suffering and emotional distress.

By contrast, the jury's award of damages for pain and suffering in the case at bar is consistent with the law governing such issues under 42 *U.S.C.* § 1983. Although petitioners assert otherwise, the very cases cited by petitioners recognize the well established and consistent principle that emotional distress damages ***can*** be based on the complainant's testimony alone. There is nothing inconsistent with the finding that such damages may be based on the complainant's testimony with the recognized principles that evidence of emotional distress must be demonstrated. Courts have consistently interpreted 42 *U.S.C.* § 1983 to permit an award of damages even if based solely on complainant's testimony, provided that the damages are supported by credible evidence. *Bolden v. Southeastern Pennsylvania Transportation Authority*, 21 *F.*3d 29 (3d Cir. 1994), *reh. den.*, 1994 U.S.App. LEXIS 10558 (1994) (holding that expert testimony not required to prove emotional distress damages in civil rights action); *McKenna v. Pacific Rail Service*, 32 *F.*3d 820 (3d Cir. 1994); *Block v. R.H. Macy & Co., Inc.*, 712 *F.*2d 1241, 1245 (8th Cir.

1983); *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977); *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 236 (8th Cir. 1976); *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7th Cir. 1974).

The basis for the difference in decisions cited by respondents has always focused on a fact specific evaluation of the ***sufficiency*** of the evidence presented and naturally will result in different results depending upon the specific facts of the case and sufficiency of the evidence at trial.

For instance, in *Hetzel v. County of Prince William*, 89 F.3d 169 (4th Cir. 1996), the court set aside an award of damages for emotional distress of $500,000 for retaliation finding that the amount of the award was based on plaintiff's erroneous belief that she was the victim of discrimination which claim the jury had rejected. Although the court recognized that the evidence presented would not justify a substantial award of damages, the court did not find that an award of damages would be improper and remanded the matter to the district court for recalculation of the award of damages for emotional distress. *Id.* at 173.

In *Cohen v. Bd. of Education*, 728 F.2d 160 (2d Cir. 1984), the jury returned a special verdict and found that plaintiff suffered emotional distress but decided not to award him any damages. The Second Circuit found that, in view of the jury's knowledge of Cohen's reinstatement and other remedies, the failure to set aside a jury verdict was not in error. *Id.* at 102-103.

In *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981), the court simply found that based upon the evidence presented, there was insufficient evidence of injury to support the award. In doing so, the court, analyzing the evidence presented, found that a single statement by a party that he was depressed or a little despondent was not enough to establish injury under the facts of that case. *Id.* at 1172-1173.

In *Spence v. Bd. of Education*, 806 F.2d 1198 (3d Cir. 1986), the Third Circuit found that "based on the facts of this case," the district court did not err in finding that the evidence was too speculative to support the award of $22,060 in emotional distress damages. The court found that plaintiff offered no evidence that she suffered physically and that the evidence consisted mainly of proof that she was depressed and humiliated by her transfer on one occasion. *Id.* at 1201.

In *Biggs v. Village of Dupo*, 892 F.2d 1298 (7th Cir. 1990), the court found that there was insufficient evidence to support the instruction on damages for mental distress. The court found that no direct testimony concerning mental distress was introduced other than plaintiff's testimony that he was concerned over the idea of "my family going through it." *Id.* at 1304.

In the case at bar, Ms. Coleman testified as to the continuous pain, suffering and humiliation that she suffered since her failure to be promoted in 1989. At trial, plaintiff explained that she was proud to be the first female investigator employed by the MCPO and started to get ahead by hard work and dedication. She explained that when she first learned of her failure to be promoted in May 1989, she was "stunned" and felt as if she had

been "kicked." She felt like a piece of "garbage." Plaintiff also testified about how she was physically affected as a result of the continual discrimination by the defendants. Plaintiff explained that she had difficulty sleeping and at times, became physically ill. It is apparent that the jury was persuaded to the extent that the discrimination affected her physical and emotional well being.

Plaintiff also testified that the discrimination also created a strain on her employment relationship. Plaintiff explained the stress involved in writing on two occasions to Prosecutor Kaye about her failure to be promoted and, upon returning to work after writing her complaints to Kaye, felt as if she was walking on "pins and needles." The plaintiff also explained how difficult it was for her to file a complaint with the EEOC after Kaye's failure to respond to her memo and described it as a "gut wrenching" experience. Plaintiff testified that she felt physically sick about having to file the charges against her boss and that her feelings intensified after the charges were filed with the EEOC. Understandably, the plaintiff feared having to go to work and face her boss after he had been served with charges.

After writing the memos, the plaintiff's employment relationship became even more difficult and stressful. Plaintiff had been the subject of numerous comments and remarks. In addition, plaintiff continued to work with the very co-workers who testified against her during the trial in this matter.

The plaintiff also explained how her failure to be promoted caused her uncertainty in planning. Plaintiff explained that she was living in a mobile home at the time that she filed the charges but was making plans to

buy a townhouse. However, due to her fear that she would have been fired after filing the charges with the EEOC, she was unable to purchase a house.

The plaintiff also explained that her decision to challenge her failure to be promoted in 1989 affected her ability to attend classes. Due to the Prosecutor's Office failure to assure plaintiff that they would not post any positions in her absence. In fact, a notice for a position was posted while plaintiff would have been away.

In light of the evidence at trial, the jury awarded $25,000 in compensatory damages of which amount $10,000 was awarded against Kaye. The amount of compensatory damages is certainly in line with other awards of compensatory damages for emotional distress that have been upheld by the courts. *See Keenan v. City of Philadelphia*, 983 F.2d 459 (3d Cir. 1993) (upholding the jury's verdict granting $640,000 in compensatory damages in favor of a police officer who alleged retaliation in violation of 42 *U.S.C.* § 1983)

CONCLUSION

The instant petition presents no issues that justify this Court's review and simply represents petitioners' dissatisfaction with the decision of the Court of Appeals. Furthermore, the decision of the Court of Appeals presents no constitutional issues relating generally to the liability of a county for the acts of a county prosecutor in New Jersey because it was based upon the court's independent and fact specific determination that the County waived any objection to jurisdiction and expressly agreed to submit the issue of its liability to the jury in the case at

bar. Moreover, the decision of the Court of Appeals was based upon its proper analysis and application of state law precedent to find that the County's liability is consistent with New Jersey state law.

As to petitioner Kaye, the decision of the Court of Appeals affirming the jury's award of damages against Kaye under 42 *U.S.C.* § 1983 was based upon its proper application of this Court's precedent. Contrary to petitioners' assertions, there is no confusion among the federal courts regarding the standards for permitting damages under 42 *U.S.C.* § 1983 and this Court's precedent has been uniformly understood and applied.

Based upon the foregoing, it is respectfully submitted that the petition fails to invoke this Court's jurisdiction and should be denied.

Respectfully submitted,

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Dated: December 4, 1996

APPENDIX

JOURNAL, MAY 15, 1995

Discrimination Award Upheld Against Prosecutor, Dismissed Against County – A federal judge dismissed a $365,000 jury award against Monmouth County for failing to promote a female investigator but upheld a $60,000 award against her boss, Monmouth County Prosecutor John Kaye.

The jury made the awards in a case tried before Judge Garrett Brown Jr. in Trenton last fall, but Monmouth County asked to intervene and have the award overturned.

In his ruling on May 4, Brown allowed the county to intervene and agreed with its position. Brown said the county wasn't properly named or served in the suit and that county prosecutors, who are appointed by the governor, answer to the state attorney general.

Last week, Linda Kenney, a Fair Haven attorney who represents the plaintiff, Barbara Coleman, 56, said that she would ask Brown for reconsideration of the decision.

She also plans a hedge in the event the appeal fails. She says that a second suit, which also alleges that Coleman wasn't promoted because she is a woman but deals with a separate incident, will be amended to include the state, Gov. Christine Todd Whitman, and Attorney General **Deborah Poritz.** The second suit, also before Brown, was filed last month, and at press time neither Kay nor the county, which this time was named, had answered.

Kaye's attorney, Gerald Dorf, of Rahway's **Dorf & Dorf,** says his client is weighing his options, but says that

there would be a cross-appeal if Coleman, who started at the office in 1978, files her appeal.

After a bifurcated trial on damages and liability before Brown, the jury ordered the county to pay Coleman $15,000 in compensatory and $350,000 in punitive damages. It also awarded $10,000 in compensatory and $50,000 in punitive damages against Kaye, whose reappointment was confirmed by the state Senate in the midst of the suit.

The awards had not been paid pending appeals. Dorf says he expects to file a brief on Kenney's fee application – for $300,000 in attorneys' fees – within the next two weeks.

Monmouth County Counsel **Malcolm Carton** says he is pleased with the verdict. As for a possible appeal by Coleman, he says, "I don't think she is going to get very far with it."

Carton, who practices at Avon's **Carton & Faccone**, also strongly disagrees with the part of the Brown decision that says state, not county officials, control the county prosecutors. The prosecutor "is not under the attorney general as many people think," he says, adding, "the prosecutor is very independent."

In fact, prosecutors are paid by the county in which they work, and Kaye's defense was paid by Monmouth County.

Jayne Rebovich, a spokeswoman for the attorney general, says that the office has not been notified about

an amendment to the second discrimination suit and has no comment.

– By Russ Bleemer

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JAMES J. GIUFFRE,	:	Civil No. 92-2014 (AET)
Plaintiff,	:	
v.	:	OPINION
NICHOLAS BISSELL et al.,	:	
Defendants.	:	

THOMPSON, Chief Judge

This matter comes before the Court on defendant Somerset County's motion for summary judgment pursuant to Fed. R. Civ. P. 56(c). For the reasons act forth below, the Court will deny defendant's motion.

Background

This case has an extensive history of litigation, including an appeal to the Third Circuit. *See Giuffre v. Bissell,* 31 F.3d 1241 (3d Cir. 1994). A general review of plaintiff's factual allegations can be found in the Third Circuit's opinion and will not be restated here. *Id.* at 1248-1251.

The County seeks summary judgment arguing that it is not liable for the actions of the county prosecutor's office or its employees. The County contends that the prosecutor's office is a state agency over which it has minimal control. Since the County does not set policy for the prosecutor's office and because the prosecutor is

appointed by the Governor of New Jersey, defendant contends that plaintiff may not recover directly from the County as a named defendant. In support of its position, the County has submitted the "expert" report of James R. Zazzali, Esq. In his letter opinion he canvases [sic] the relevant case law and concludes that under the facts of the present case, the defendants are agents of the State of New Jersey, not Somerset County.

Plaintiff argues that the alleged actions taken by the prosecutor's office against plaintiff reflect a relationship with the County which is sufficient to create liability. Plaintiff contends that the individual defendants (primarily Prosecutor Bissell) hold positions with the County of such significance that their actions in this case may be imputed to the County. Plaintiff also contends that the County may be held liable because it benefits from the forfeiture statute used to allegedly coerce plaintiff into transferring to the County his ownership interest in certain places of real estate.

Discussion

I. Procedural Arguments

Plaintiff first opposes the County's motion on procedural grounds. Relying on the law of the case doctrine as well as this Court's 1993 scheduling Order, plaintiff contends that the Court has already ruled on the issue raised by the instant motion. Alternatively, plaintiff argues that the County waived its right to bring this motion. The law of the case doctrine at most advises against reconsideration of previously litigated issues. *Fagan v. City of Vineland*, 22 F.3d 1283, 1290 (3d Cir. 1994).

Plaintiff argues that this Court's July 29, 1993 Memorandum and Order rejected defendant's claim that the County is not liable for the acts of the individual defendants. While the issue may have been raised by the County in its July 1993 reply brief, the Court did not address nor decide it. Therefore, the Court concludes that the law of the case doctrine is inapplicable.

With respect to the timeliness of the County's summary judgment motion, the Court notes that Fed. R. Civ. P. 56 permits summary judgment motions to be filed any time during the litigation provided ten days within which to hold a hearing remain before trial. *In Re School Asbestos Litigation*, 977 F.2d 764, 793 (3d Cir. 1992). While the Court's 1993 scheduling Order required dispositive motions to be filed before June 11, 1993, this Court has the discretion to modify that Order and to consider subsequently filed motions. Moreover, the complexities which have delivered this case to its present posture warrant the Court's consideration of the County's liability. Therefore, the Court concludes that defendant Somerset County has not waived its right to bring the instant motion.

Plaintiff next argues that the County's responses to certain interrogatories bar the present motion. Specifically, plaintiff directs the court to interrogatories covering "policies and procedures by the Somerset County Prosecutor's Office and the County in effect from May 10, 1990 to the present." (Pl.'s Cross-statement of Material Facts Ex. A.) Apparently defendant Bissell, as a county representative, responded to these interrogatories. Plaintiff contends that allowing Bissell to answer the interrogatories on behalf of the County is tantamount to

admitting that Bissell is a county policy-maker. Plaintiff also directs the Court to the County's statement that the individual defendants acted within the scope of their employment "by the County" in committing the unconstitutional conduct alleged in plaintiff's complaint. Estopping the County from arguing that the individual defendants are not "County policy-makers" would ascribe far too much significance to the factors plaintiff relies upon. Plaintiff's argument is especially weak given that all the defendants were represented by the same attorney until recently. The Court will therefore reach the merits of defendant's motion.

II. Summary Judgment Standard of Review

A court may enter summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has satisfied this initial burden, the opposing party must establish that a genuine issue exists. *Jersey Central Power & Light Co. v. Lacey Township*, 772 F.2d 1103, 1109 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986). Not every issue of fact will be sufficient to defeat a motion for summary judgment; issues of fact are genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). It is not enough to simply show that some "metaphysical" doubt exists as to the material facts. *Metsushita Electric Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Further, the opposing party cannot rest upon mere allegations; it must present actual evidence that creates a genuine issue

of material fact. *Liberty Lobby*, 477 at 249 (citing *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)). The court must draw all reasonable inferences in the opposing party's favor, and must accept that party's evidence when considering the merits of the summary judgment motion. *See Country Floors, Inc. v. A Partnership Composed of Genner and Ford*, 930 F.2d 1056, 1061 (3d Cir. 1991).

In deciding a motion for summary judgment, it is not the court's role to make findings of fact, but to analyze the facts presented and determine if a reasonable jury could return a verdict for the nonmoving party. *See Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1262 (1993). It is in this light the Court must undertake an analysis of the facts of this case.

III. The County's Liability

In *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978), the United States Supreme Court addressed the liability of a local government entity under 42 U.S.C. § 1983. The Court concluded that § 1983 does not permit a municipality to be held vicariously liable for the actions of its employees under the theory of *respondeat superior. Id.* at 694. However, a municipality may be liable under § 1983 where "action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 691. Since *Monell*, the Supreme Court has refined the doctrine of municipal liability. In *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986), the Court explained that "*Monell*, was a case about responsibility," Justice Brennan,

in his Opinion for the Court, noted that § 1983 imposes liability "only on a person who 'subjects, or causes to be subjected,' any individual to a deprivation of federal rights . . . " *Id.* (quoting *Monell*, 436 U.S. at 692). Hence, the plaintiff in a § 1983 action must show that the acts which caused his harm are "acts which the municipality has officially sanctioned or ordered." *Id.* at 480. The plaintiff will have satisfied his burden if he can show that his injury can be traced to "municipal officials who have 'final policymaking authority' " in that area of the government's business. *City of St. Louis v. Propromik*, 485 U.S. 112, 123 (1988) (O'Connor, J.) (citing *Pembaur*, 475 U.S. at 483). Whether an individual is a policy-maker for the municipality is a matter of state or local law to be decided by the court before the case is submitted to the jury. *Id.* at 124 (citing *Pembaur*, 475 U.S. at 483); *Jett v. Dallas Independent School District*, 491 U.S. 701, 737 (1988).

New Jersey courts have not addressed whether a county may be held liable for the acts of the county prosecutor under 42 U.S.C. § 1983. However, the New Jersey Supreme Court has generally addressed the relationship among the county prosecutor, the county and the state on more than one occasion. In *Morss v. Forbes*, 24 N.J. 341, 374 (1957), the Court held that the New Jersey State Constitution's separation of powers doctrine would not be violated if a county prosecutor had to disclose certain documents to a committee of the New Jersey State Legislature. The Court found that county prosecutors were not sufficiently controlled by the executive branch of the state government to warrant executive privilege on separation of powers grounds. *Morss*, 24 N.J. at 372-73. The Court noted that the:

> prosecutor is primarily a local official. There is no equality in statute or dignity with the legislature. He cannot claim freedom from properly conducted legislative investigation on the ground that such will subvert the division or powers envisioned by our forefathers as an effective check on despotism.

Id. at 373.

In *Cooper v. Imbriani*, 63 N.J. 535 (1973) (*per curiam*) the defendant county denied tenure to detectives working for the county prosecutor on the ground that the detectives were not county employees, but rather employees of the county prosecutor's office. Interpreting N.J. Stat. Ann. §§ 2A:157-1. *et seq.*, the New Jersey Supreme Court ruled that for purposes of that statute, the detectives were in fact county employees and therefore entitled to tenure protection.

Of the cases decided by the New Jersey courts, *Cashen v. Spann*, 66 N.J. 541, 552, *cert. denied*, 423 U.S. 829 (1975) is most analogous to the case *sub judica*. The issue in *Cashen* was whether a county was vicariously liable for the acts of the county prosecutor's office and its employees relating to the investigation of criminal activity. The plaintiff in *Cashen* sought to hold the county vicariously liable for damages arising out of an allegedly illegal search of his home. The Court concluded that, under the facts of the case, the county was not liable because the prosecutor and his detectives should be considered agents of the state, not the county. The Court stated, "[w]e find it appropriate to regard the defendant officials as State agents where the alleged tortious conduct arose out of the investigation of criminal activity, but

we express no opinion on the question of whether the prosecutor or his detectives can be considered State or county employees for other purposes." *Id.*

Shortly thereafter, the New Jersey Supreme Court decided *Dunne v. Fireman's Fund American Insurance Company,* 69 N.J. 244, 250 (1976). Both *Dunne* and *Cashen* involved the same illegal search incident. The issue in *Dunne,* however, was whether the county's insurer was required to pay to defend the suit under the terms of its policy with the county. Although the Court had previously held that the county was not vicariously liable for the alleged acts of the defendants in the case, the Court concluded that the insurance policy required the insurer to defend the suit. In reaching its conclusion, the Court stated:

> the county-county detective relationship is that of employer-employee for certain administrative and remunerative purposes. This finding is not inconsistent with our conclusion that in preparing and executing the affidavit upon which the search warrant was based and conducting the search, Dunne, Bickley and Spann were "agents of the State." At the same time they were also employees of and there existed an employer-employee relationship with the County.

Dunne, 69 N.J. at 250-51.

Subsequently, the Superior Court, Appellate Division held that assistant prosecutors and detectives are employees whose "authority and duty" relate to a county only. *Passaic County Prosecutor v. Passaic County Freeholders,* 159 N.J. Super. 258, 267 (App. Div. 1978). The defendant county in *Passaic* had imposed a residency

requirement on assistant prosecutors and detectives duly appointed by the plaintiff county prosecutor. However, the Appellate Division's decision upholding the residency requirement rested primarily on the language of particular statutes which are not relevant to the present case.

The New Jersey courts appear to have drawn a distinction between substantive or discretionary duties involving law enforcement, where the actors are viewed as state agents, and personnel issues, where the actors are viewed as county agents. Superficially, the prosecutor's status as a state or county agent would appear to determine the issue of county liability. Since the parties in the present case do not dispute that the prosecutor is the final policy-maker for his office, a finding that he is a county agent would, in theory, render the county liable, However, municipal liability under § 1983 is not premised on an agency relationship in the same way as liability under the doctrine of *respondeat superior.* Rather § 1983 assigns liability only to a person who "subjects, or causes to be to be [sic] subjected," any individual to a deprivation of human rights. *Pembaur,* 475 U.S. at 478. In other words, "recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality' – that is, acts which the municipality has officially sanctioned or ordered." *Id.* at 480. Therefore, the prosecutor's status as a state or county agent, although relevant to determining county liability, must be considered along with the overall dynamic between the county prosecutor's office and the county as well as the county's role in causing the harm plaintiff allegedly suffered.

In New Jersey, criminal law enforcement is primarily the responsibility of the county prosecutor. N.J. Stat. Ann. § 158-1. Each prosecutor's jurisdiction is limited to the borders of the county itself. *Id.* The county funds the prosecutors' office entirely. N.J. Stat. Ann. §§ 2A:158-1 *et seq.* The county obviously benefits tremendously from the operation of the prosecutor's office because of its role in minimizing crime and ensuring that criminals are quickly and appropriately punished. However, the county appears to have little control over the prosecutor because he is a Governor's appointee who is ultimately responsible only to state officials. Whether an individual will be investigated by the prosecutor's office, how the investigation is conducted, the questioning of the suspect, the decision to dismiss charges and the decision to invoke the forfeiture statute[1] are decisions outside the county's authority. Plaintiff has not directed the Court to judicial or statutory authority which indicates that Somerset County could have prevented defendants from committing the allegedly unconstitutional acts. The County had no authority to terminate the prosecutor, to approve or disapprove of his actions, or to legislate the laws he is to

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[1] N.J. Stat. Ann. § 2C:64-3(a) states:

> Whenever any property other than prima facie contraband is subject to forfeiture under this chapter, such forfeiture may be enforced by a civil action, instituted within 90 days of the seizure and commenced by the State and against the property sought to be forfeited.

The property in the present case, real estate owned by Giuffre, is not prima facie contraband and its forfeiture is therefore governed by this statute. The Court notes that the action is commenced in the name of the state and not the county.

enforce.[2] This Court realizes the apparent inequity of requiring a county, in essence its tax-payers, to be liable for the actions of an office whose director is selected by the Governor and over which it exercises no control. However, the nature of the county prosecutor's office, the reason for its existence and the individuals whom it is designed to serve reveal its inherently local nature. Thus the Court concludes that under some circumstances a county may be liable for the decisions of its prosecutor. The facts alleged in the present case exemplify the hybrid role of the county prosecutor and the type of conduct which would warrant holding the County liable for his actions.

Plaintiff alleges that prosecutor Bissell initially offered him the opportunity to repurchase his forfeited property from the County for $100,000. The prosecutor is alleged to have then rejected plaintiff's subsequent offer in that amount. Plaintiff contends that the property was eventually sold to "insiders" for a significantly smaller sum. Although these allegations constitute only a portion of plaintiff's complaint, they are significant because the

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[2] The Court notes that forfeiture provisions require county approval for the prosecuting agency to use seized property pending the disposition of the forfeiture action. N.J. Stat. Ann. § 2C:64-3(h). This requirement is sensible since under the statute title in illegally used or obtained property vests in the entity funding the prosecuting agency at the time the property was illegally used or obtained. N.J. Stat. Ann. § 2C:64-7. However, it does not extend to the county any authority to enforce the forfeiture provisions or to direct the prosecutor's office in its enforcement of the forfeiture provisions.

forfeiture statute does not anticipate the county prosecutor's participation in the sale of the property after it has been forfeited. The statute merely states that title in the property will vest with the county. N.J. Stat. Ann. § 2C:64-7. Hence, plaintiff's allegations suggest that the prosecutor carried out duties for the County which extended beyond his investigatory and prosecutorial roles.

Plaintiff further argues that because the County generally benefits from the forfeiture statute, it should be liable for the tortious conduct of those individuals acting pursuant to the statute's authority. This theory of liability appears inconsistent with the underlying goals of § 1983 as expressed by the United States Supreme Court and in the New Jersey Supreme Court's cases dealing with the county-county prosecutor relationship. The benefit to the County is purely financial and has no effect on the operation of the prosecutor's office. Moreover, the County has no clear authority to direct forfeiture, it is merely a recipient of funds or property. This structural description, although usually accurate, ignores the very essence of plaintiff's complaint in the case *sub judice*.

The allegations here reflect an agreement involving property not all of which would have been subject to forfeiture (according to plaintiff) and which was not consummated in a court of law. The prosecutor's alleged role in the acquisition and disposition of plaintiff's property may not be so easily dismissed as beyond the County's authority. The Court is cognizant of how "intimately connected with the criminal process" a civil forfeiture action is. *Schrob v. Catterson*, 948 F.2d 1402, 1411 (3d Cir. 1991) (referring to the federal forfeiture statute). The present

case, though, does not present the typical *in rem* proceeding for the forfeiture of property.

Plaintiff cites to a *Davis v. Ector County, Texas*, 40 F.3d 777 (5th Cir. 1994) and *Dotson v. Chester*, 937 F.2d 920 (4th Cir. 1991). In both cases, the courts held that high level county employees who, under state law, were considered state officials, were nevertheless county policy-makers. In *Davis*, the Ector County District Attorney, who exercised "free reign" over the District Attorney's office and set policy "without oversight," was held to be a policy-maker for the County. The Fifth Circuit noted that although the office of District Attorney is state created, it is "limited to exercising powers in Ector County, it is elected by Ector County voters, and it is supported with Ector County funds." The *Davis* Court relied heavily on *Crane v. State of Texas*, 766 F.2d 193 (5th Cir.), *cert. denied*, 474 U.S. 1020 (1985). In *Crane*, the Fifth Circuit addressed whether, for purposes of a civil rights action, a Texas District Attorney is a state or county agent. The Court held:

> Other and more significant factors, generally speaking, argue he is a local official. He is elected by the voters of his district, usually one county. His major powers and duties – which concern the prosecution of serious crimes and which he exercises alone without responsibility to the state Attorney General, who has no general prosecutorial powers, – are limited to the territory of the district. He is paid by county funds, although these are partly reimbursed by the state.

* * *

> For present purposes, then, we conclude that he is properly viewed as a county official, elected by its voters and responsible for its relevant policy.

Crane, 766 F.2d at 195.[3]

In *Dotson*, the Fourth Circuit similarly concluded that an elected county sheriff was the final policy-maker for the county with respect to the operation of the county jail. 937 F.2d at 932. The Fourth Circuit focused on a myriad of factors including the sheriff's status as an elected official and the sheriff's role as manager of the county facility. *Id.*

Naturally, the New Jersey law which calls for the appointment of county prosecutors by the Governor distinguishes the present case from *Davis*, *Crane* and *Dotson*. Nevertheless, the elected status of the officials was only one factor which these courts considered. In New Jersey, the Supreme Court has clearly held that liability of the county is a fact specific inquiry. *Cashen*, 66 N.J. at 552. The

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[3] The *Crane* Court also stated, "But even were he a State official in every sense, called so in State law and designated by the State to make policy for its other creature, the county, our answer would likely remain the same; county responsibility for violation of the Constitution cannot be evaded by such ingenious arrangements." 766 F.2d at 195. This language suggests that a county would under almost all circumstances be liable for the actions of the county prosecutor. However, the Fifth Circuit's decision in *Crane* was entered in 1985, before the Supreme Court's holdings in *Pembaur*, 475 U.S. 469, and *Praprotnik*, 485 U.S. 112, were handed down. These two holdings leave the question of whether an individual has final policy-making authority in the hands of the states, limiting the Fifth Circuit's language in *Crane*.

allegations of abuse by defendant Bissell in conjunction with other county officials, for a purpose which benefits the County financially, highlight the intimate relationship between Somerset County and defendant Bissell's office. Unlike the prosecutor in *Cashen* whose abuses arose from actions which fell squarely within the traditional role of a prosecutor, defendant Bissell is alleged to have engaged in more expansive misconduct extending well beyond the reach of his office. Justice O'Connor warned lower courts to be wary of "egregious attempts by local governments to insulate themselves from liability for unconstitutional policies." *Id.* at 127. The Court is satisfied that acts allegedly committed by defendant Bissell, if proven, could constitute official county policy. Therefore the Court will deny the County's motion for summary judgment on the federal claims at this time.

Since the Court will deny defendant's motion on plaintiff's federal claims, the Court will retain jurisdiction over plaintiff's state claims.

Conclusion

In light of the foregoing, the Court will deny defendant Somerset County's motion for summary judgment. An appropriate order is filed herewith.

May 7th, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JAMES J. GIUFFRE, Plaintiff, v. NICHOLAS BISSELL, et al., Defendants.	:	Civil No. 92-2014 (AHT) **ORDER**

For the reasons set forth in the Opinion filed herewith, it is on this 7th day of May 1995

ORDERED that defendant Somerset County's motion for summary judgment be and hereby is denied.

/s/ Anne E. Thompson
ANNE E. THOMPSON,
CHIEF JUDGE

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOSEPH M. KNODEL, Plaintiff, v. STATE OF NEW JERSEY; COUNTY OF UNION; OFFICE OF THE UNION COUNTY PROSECUTOR/STATE OF NEW JERSEY, OFFICE OF THE COUNTY PROSECUTOR/ UNION COUNTY PROSECUTOR'S OFFICE; UNION COUNTY PROSECUTOR JOHN H. STAMLER; FIRST ASSISTANT UNION COUNTY PROSECUTOR EDMUND J. TUCKER; UNION COUNTY PROSECUTOR'S OFFICE TRIAL SUPERVISOR RICHARD P. RODBART; and UNION COUNTY PROSECUTOR'S OFFICE OF JUVENILE SECTION SUPERVISOR ROBERT P. O'LEARY, Defendants.	Civil Action No. 89-2470 **OPINION**

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BISSELL, *District Judge*

This civil action was filed on June 9, 1989 by Joseph M. Knodel alleging various unlawful employment practices by his employer, the Union County Prosecutor's Office ("Prosecutor's Office"). Additional defendants named in this action include the State of New Jersey, County of Union, Union County Prosecutor John H. Stamler, First Assistant Union County Prosecutor Edmund J. Tucker, Trial Supervisor Richard P. Rodbart and Juvenile Section Supervisor Robert P. O'Leary.

On February 7, 1987, the plaintiff was hired by the Union County Prosecutor's Office as a "Legal Intern." (Compl. ¶ 9). At the time, Mr. Knodel was in his second year of law school. (*Id.*) On January 1, 1988, Mr. Knodel was "promoted" to the position of "Criminal Justice Specialist" and received a commensurate pay raise. (*Id.*, ¶ 10). On Augut [sic] 3, 1988, the plaintiff received an 8% merit pay increase, bringing his annual salary up to $16,014.00. (*Id.*, ¶ 12). It is alleged, however, that on August 29, 1988, two women were hired as Criminal Justice Specialists at higher salaries than the plaintiff. (*Id.*,

¶ 13). The two women were paid $18,000.00 and $20,500.00 a year respectively. (*Id.*, ¶ 14). On October 18, 1988, the defendants offered Mr. Knodel an increase in his salary to $18,000.00 a year, retroactive to September 20, 1988. (*Id.*, ¶ 15). The plaintiff alleges that he challenged the pay differential and was threatened, abused and harassed by the defendants. (*Id.*, ¶¶ 15-17). Ultimately, he was discharged. (*Id.*, ¶ 17).

The complaint charges defendants with wage discrimination in violation of the Equal Pay Act (Count I); retaliation for asserting a violation of the Equal Pay Act (Count II); wage discrimination in violation of the New Jersey law (Count III); retaliation for asserting wage discrimination in violation of New Jersey law (Count IV); violations of the first and fourteenth amendments to the United States Constitution (Count V); violations of the New Jersey Constitution (Count VI); violations of the fifth and fourteenth amendments (Count VII); and intentional infliction of emotional distress (Count VIII).

Plaintiff has invoked the original jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 42 U.S.C. § 1983.

Presently before the Court is defendant County of Union's motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6).

DISCUSSION

Rule 12(b)(6) Analysis

Fed. R. Civ. P. 12(b)(6) states that:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion. . . . (6) failure to state a claim upon which relief can be granted.

Union County contends that Mr. Knodel, as an employee of the Union County Prosecutor's Office and not the County of Union, cannot properly maintain an action against it. (Br. in Support at 4). Union County argues that the prosecutor's office is an independent *state* agency that is not controlled by the county government. Therefore, the plaintiff is not a *county* employee. (*Id.*, at 13). Defendant points to the legislative history of the formation and structure of county prosecutors' offices and their relative independence from the Board of Chosen Freeholders as evidence of their total freedom from the county in employee matters. (*Id.*, at 5-6) (citing N.J.S.A. 40:20-1.3a-1.3c and 40:20-1.4). Defendant also cites several New Jersey court decisions that held, in the context of lawsuits against the prosecutor's office, that the prosecutor and his detectives were agents of the state and not the county. (*Id.*, at 6-8).

The standard for withstanding a motion to dismiss under Rule 12(b)(6) is not a difficult one to meet. "While a complaint should not be dismissed unless the court determines that the allegations do not support relief on

any legal theory, the complaint nonetheless must set forth sufficient information to suggest that there is some recognized legal theory upon which relief may be granted." *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1078 (D.C. Cir. 1984). Similarly, "[i]t is axiomatic that, to withstand a motion to dismiss, a plaintiff is not required to provide evidence of or prove the truthfulness of his complaint." *Quinones v. Szorc*, 771 F.2d 289, 291 n.3 (7th Cir. 1985). *A fortiori*, a

> [c]omplaint should not be dismissed merely because plaintiff's allegations do not support the particular legal theory he advances, since the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory, nor should the complaint be dismissed that does not state with precision all the elements that give rise to a legal basis for recovery; nor should a complaint be dismissed merely because the court doubts plaintiff will prevail in the action since that determination is properly made on the basis of proof and not merely on pleadings. The question therefore is whether in the light most favorable to plaintiff the complaint states any valid claim for relief. As a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in an unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.

Thomas W. Garland, Inc. v. St. Louis, 596 F.2d 784, 787 (9th Cir.), *cert. denied*, 444 U.S. 899 (1979) (quoting *Jackson Sawmill Co. v. United States*, 580 F.2d 302, 306 (8th Cir. 1978)).

In the present case, the plaintiff Knodel has clearly advanced allegations which could lead to the relief he seeks. The fact that county prosecutors' offices have more autonomy from county government structure than other county offices does not mean that the county is free from liability.

The County of Union, through its Board of Chosen Freeholders, annually appropriates the funds to be used by the Union County Prosecutor's Office. *See* N.J.S.A. 40:20-1. Additionally, the county prosecutor, as an executive appointment (N.J. Const., art. 7, § 2, ¶ 1), is vested with the authority to seek additional funding by order of the assignment judge for the county. N.J.S.A. 2A:158-7 provides:

> All necessary expenses incurred by the prosecutor . . . shall, upon being certified to by the prosecutor and approved, under his hand, by a judge of the superior court . . . be paid by the county treasurer *whenever the same shall be approved by the board of chosen freeholders of such county.* The amount or amounts to be expended shall not exceed the *amount fixed by the board of chosen freeholders* in its regular or emergency appropriation, unless such expenditure is specifically authorized by order of the assignment judge of the superior court for such county.

(Emphasis added). This statute illustrates the county's direct role in the finances of the prosecutor's office. Even though the prosecutor may apply to the assignment judge for additional money, the board of chosen freeholders is the primary authority. For example, the salaries for certain employees require the board's approval. N.J.S.A.

2A:158-16 provides that assistant prosecutors' annual salaries will "be fixed by resolution of the board of chosen freeholders on recommendations of the county prosecutor. . . . "

Several New Jersey court decisions have examined the relationship between prosecutors' offices and the county. In *Ruvoldt, Jr. v. Clark, Jr.*, 204 N.J. Super. 438 (App. Div. 1985), the Appellate Division held that the prosecutor was not required to obtain the freeholders' permission for *non-salary* expenditures which do not exceed the budget. The court noted, however, that this did not mean the county was "bereft of authority" with respect to funding. (*Id.* at 441). The court stated:

> The County Freeholders must make the initial determination as to the amount of the appropriations for the Prosecutor's Office. If the Prosecutor differs, he must establish before the Assignment Judge the reasonable necessity of expenditures in excess of the amount authorized by the Freeholders. Furthermore, the Board of Freeholders has statutory authority to fix salaries in the Prosecutor's Office, even if those salaries are within the Prosecutor's appropriations.

(*Id.*, citing *In re Ruvoldt Application*, 187 N.J. Super. 81, 91 (App. Div. 1982) and N.J.S.A. 2A:158-16). The court explained the role of the county government as one limited by statute. The court held:

> Without in any way denigrating county government's significant place in our governmental scheme, it would be incongruous to permit county government to control the operations and functions of the Prosecutor, a constitutional

> officer entrusted with awesome duties of "vast importance to the public". County government has a rightful role to play in the formulation and approval of the Prosecutor's budget and the fixing of salaries within the Prosecutor's office; all as set forth by statute, and all, of course, subject to the authority of the Assignment Judge under the *Bigley* statute.
>
> However, the imperative of independent and effective law enforcement requires that county authority be limited to those specifically authorized areas. Expanding county authority vis-a-vis the Prosecutor is not warranted by statutory construction or good public policy.
>
> To summarize, the non-salary expenditure sought here by the Prosecutor is within his authorized budget and therefore not subject to County control or to Assignment Judge supervision.

(*Id.* at 442-43).

Similarly, in *Tate v. Amato*, 220 N.J.Super. 235 (App. Div. 1987), the Appellate Division held that the county executive properly exercised his authority, to avoid exceeding spending limits, when he refused to process personnel forms necessary for the prosecutor to hire additional employees. The court stated that the proper procedure for a prosecutor to obtain funds in excess of the county appropriation is to apply to the assignment judge. (*Id.* at 241). This is commonly referred to as a *Bigley* application. *See In re Application of Bigley*, 55 N.J. 53 (1969) (prosecutor has right to seek additional funds under N.J.S.A. 2A:158-7).

Perhaps the most relied upon and emphasized case by both parties to this motion is *Cashen v. Spann*, 66 N.J. 541, *cert. denied*, 423 U.S. 829 (1975). In *Cashen*, plaintiffs brought a civil action against the County of Morris, the county prosecutor, various county detectives, the telephone company and the unidentified informant for damages arising from an allegedly illegal search of their home (*Id.* at 544). In the context of this suit, the New Jersey Supreme Court held that county detectives were agents of the state and not the county. (*Id.* at 552). However, the Court limited its holding to the facts of the particular case before it. (*Id.*) The Court stated:

> We also agree with the Appellate Division that in the context of this case, the prosecutor and the detectives are to be considered as agents of the State and not the county. *Cashen, supra*, 125 N.J. Super. at 404-05. We wish to make it clear, however, that our resolution of this issue is limited to the factual circumstances here presented. *We find it appropriate to regard the defendant officials as State agents where the alleged tortious conduct arose out of the investigation of criminal activity, but we express no opinion on the question of whether the prosecutor or his detectives can be considered State or county employees for other purposes. See Cooper v. Imbriani*, 63 N.J. 535 (1973). We also leave for another day the question of whether a county may be held vicariously liable for the conduct of a prosecutor or his detectives in other circumstances.

(*Id.*) (emphasis added).

In a subsequent related action, the New Jersey Supreme Court emphasized the "hybrid status" of county prosecutors' detectives. *Dunne v. Fireman's Fund Am. Ins.*

Co., 69 N.J. 245, 248 (1976). In deciding that the Morris County Prosecutor's Office detectives were "persons insured" under the county's liability policy, the Court noted

> County prosecutors' detectives possess a hybrid status. The position has been created by the County Detectives and County Investigators, Act. N.J.S.A. 2A:157-1 *et seq.* – the title, perhaps indicative of some legislative intent, reflects their identification with the county. The Act authorizes the prosecutor to appoint persons "to be known as county detectives, to assist the prosecutor in the detection, apprehension, arrest and conviction of offenders against the law." N.J.S.A. 2A:157-2. The prosecutor, a State officer, selects and supervises them. The financial burdens related to the position are imposed on the county. The salary is paid by the county. N.J.S.A. 2A:157-18. The prosecutor may, with the approval of the board of chosen freeholders, fix the salary in excess of the statutory minimum. N.J.S.A. 2A:157-18. No county detectives may be appointed in counties where the number of detectives exceed the maxima fixed by statute (50 in the first class counties, N.J.S.A. 2A:157-3, 28 in certain second class counties, N.J.S.A. 2A:157-4, etc.), without the prior approval of the board of chosen freeholders, except in a county of the first class with a population under 800,000. N.J.S.A. 2A:157-22. Further, all necessary expenses incurred by county detectives, such as costs of insurance, automobiles, and other necessities, must be paid by the county. N.J.S.A. 2A:157-19 and 2A:158-7. The amounts may not exceed those fixed by the freeholders unless specifically authorized by the Superior

> Court assignment judge for that county. *In re Application of Bigley,* 55 N.J. 53 (1969); *In re Application of Schragger,* 58 N.J. 274 (1971). In those cases we pointed out that even where the assignment judge determines the number of additional detectives to be hired at certain salaries it was appropriate for the prosecutor initially to present his needs to the freeholders before turning to the assignment judge for relief.
>
> * * *
>
> Recognition of county control over county detectives and of existence of an employer-employee relationship is not novel. In *Cooper v. Imbriani,* [63 N.J. 535 (1973)], we expressly rejected the contention that they were not county employees, at least for the purpose of determining whether they were in the classified service [civil service status].-(*Id.* at 537 n.1).

Dunne, 69 N.J. at 248-49. The Court reasoned that,

> From all the foregoing it may be seen that the county-county detective relationship is that of employer-employee for certain administrative and remunerative purposes. This finding is not inconsistent with our conclusion that in preparing and executing the affidavit upon which the search warrant was based and conducting the search, Dunne, Bickley and Spann were "agents of the State." At the same time they were also employees of and there existed an employer-employee relationship with the County.

(*Id.* at 250-51).

Cashen and *Dunne* dealt with the issue of county detectives in the performance of their official duties. The

New Jersey Supreme Court recognized their dual capacity as both state *agents* and county *employees* depending upon the situation. In the matter *sub judice*, the plaintiff was a legal assistant, a support staff position, funded directly by the county. *See* N.J.S.A. 2A:158-18.1 and *Cetrulo v. Byrne*, 55 N.J. Super. 199 (1959), *aff'd*, 31 N.J. 320 (1960). In *Cetrulo*, the New Jersey Supreme Court emphasized that it is the county prosecutor's right, not the board of freeholders, to directly appoint legal assistants. 31 N.J. at 328-29. While it is the prosecutor's duty to appoint or select the individuals to fill such positions, the county freeholders "provide for" their appointment and pay their salaries. (*Id.* at 329). The Court stated that "where legal assistants are appointed by the county prosecutor . . . he will obtain approval of the board [of chosen freeholders] for payment of their salaries. . . . " (*Id.* at 329-30).

The previous cases demonstrate the relationship between the prosecutor and the county. The county has the initial responsibility for appropriating the annual budget for the prosecutor's office. Realizing the important role vested with the prosecutor, the legislature provided an additional procedure to obtain funds in excess of the budget by obtaining an order from the assignment judge. This procedure clearly demonstrates the necessity of including the County of Union as a defendant in this action.

Further support for this is obtained in Fed. R. Civ. P. 19. Rule 19(a)(1) provides:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action

> shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, ...

In *Troy Towers Tenants Ass'n v. Botti*, 94 F.R.D. 37, 38 (1981), the United States District Court for the District of New Jesey [sic] explained that Rule 19(a)(1) required cities and local governments "to be joined as parties when they will be affected by the lawsuit or when adequate relief cannot be awarded in their absence." *See also Albro v. County of Onondaga, N.Y.*, 627 F. Supp. 1280, 1289 (N.D.N.Y. 1986). Since the county is the primary source of funding for the prosecutor's office, any judgment against that office would necessarily involve the county in satisfying the award. Defendant Union County has not met its burden of showing that there is *no* "recognized legal theory upon which relief may be granted" against it. At the very least, it appears that should plaintiff prevail, Union County will have to appropriate and/or allocate funds to satisfy any money judgment.

CONCLUSION

For the foregoing reasons, the County of Union's motion to dismiss the complaint is denied.

/s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

DATED: January 5, 1990

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOSEPH M. KNODEL, Plaintiff, v. STATE OF NEW JERSEY; COUNTY OF UNION; OFFICE OF THE UNION COUNTY PROSECUTOR/STATE OF NEW JERSEY, OFFICE OF THE COUNTY PROSECUTOR/ UNION COUNTY PROSECUTOR'S OFFICE; UNION COUNTY PROSECUTOR JOHN H. STAMLER; FIRST ASSISTANT UNION COUNTY PROSECUTOR EDMUND J. TUCKER; UNION COUNTY PROSECUTOR'S OFFICE TRIAL SUPERVISOR RICHARD P. RODBART; and UNION COUNTY PROSECUTOR'S OFFICE JUVENILE SECTION SUPERVISOR ROBERT P. O'LEARY, Defendants.	Civil Action No. 89-2470 **ORDER**

For the reasons set forth in the Court's opinion filed herewith,

It is on this 5th day of January, 1990,

ORDERED that defendant County of Union's motion to dismiss the complaint be and it hereby is denied.

/s/ John W. Bissell
JOHN W. BISSELL
United States District Judge